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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ANTHONY CANCILLA, ALBERT CAMMARATA, ALBERT DIULUS, MAURICE ORLANSKY, PHILIP SCOLIERI, WILLIAM C. FUSARO, NICHOLAS GOBOS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 4, 1973.

CITATIONS TO OPINIONS BELOW

The district court's opinion denying motions to suppress evidence and to dismiss the indictment is reported at 339 F. Supp. 171 and is reprinted in Ap-

pendix A, *infra*. The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1973. A timely petition for rehearing was filed and was denied June 6, 1973 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the authorization and identification procedures followed by the Department of Justice in this case were sufficient to comply with Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 and whether the evidence obtained by wiretap should have been suppressed.

2. Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. 1955 and require that the conspiracy convictions be reversed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D, infra.

STATEMENT OF THE CASE

The defendants in this case were charged with various violations of federal laws relating to illegal gambling activities; they were all convicted of conspiracy to violate 18 U.S.C. 1955 and of the substantive offence of violating 18 U.S.C. 1955. The facts relevant to this petition are as follows:

On October 19, 1970 Senior District Judge Wallace S. Gourley, sitting in Pittsburgh, Pennsylvania, upon submission of an application and affidavit to him by John M. Elias, an attorney for the Department of Justice, authorized the interception of incoming and outgoing calls at the residence of Robert and Dolores Iannelli. (52A)* The application was purported to have been authorized by Will Wilson, Assistant Attorney General for the Criminal Division of the Department of Justice and was accompanied by a letter which purported to bear his signature. (39A, 52A)

Motions to suppress were filed as well as a motion to compel admissions. (82A, 85A, 102A) In the course of the pretrial discovery and motion procedure it was disclosed that Will Wilson did not sign the letter of authorization nor did he ever review the file. (112A) Affidavits were submitted by Sol Lindenbaum and Henry Peterson which disclosed that the letter was actually signed by Henry Peterson, an assistant to Mr. Wilson. (121A) The affidavit of Mr. Lindenbaum indicated that the then Attorney General, John Mitchell, had personally authorized the application. (109A) A copy of a memorandum from Mitchell to Wilson allegedly bearing Mitchell's initials was produced with Lindenbaum's affidavit. (111A) By this memorandum Mitchell designated Will Wilson to authorize the application.

Because of the paucity of facts contained in the affidavits and the failure of the Attorney General to submit an affidavit in this case, defendants requested and were granted permission to depose Mr. Lindenbaum. Mr. Lindenbaum's deposition disclosed that he

* These references are to the Appendix in the Court of Appeals.

had never seen the Attorney General initial the memo and that he actually did not know who placed the initials on the memo. (407A, 411A) The district court refused to suppress on the assumption that the Attorney General had personally initialed the memo. (435A) At no time up to the present has the Justice Department offered to submit an affidavit from Mr. Mitchell.

The evidence gained by the wire interceptions was utilized at the trial and tended to show that the defendants were engaged in a large scale sports betting operation. All of the petitioners here were convicted and received substantial prison sentences and fines.

REASONS FOR GRANTING THE WRIT

1. The question presented here with respect to the authorization and identification procedures utilized by the Department of Justice is identical to that posed by *United States* v. *Chavez,* No. 72-1319, certiorari granted May 22, 1973. The question posed here is also similar to the question posed in *United States* v. *Giordano,* No. 72-1057, certiorari granted March 26, 1973.

The only factual distinctions between the instant case and *United States* v. *Chavez* are that in *Chavez* there were two taps, one personally authorized by Attorney General Mitchell and the second authorized by Sol Lindenbaum, his Executive Assistant. The first tap in *Chavez* was suppressed because of misidentification and the second was suppressed because of improper authorization. In the instant case there was only one tap in which the authorizing officer was clearly misidentified. Whether the application in this case was authorized personally by the Attorney General is

not known, in point of fact, the record does not disclose who authorized it. Thus the interesting question is raised as to whether mere assumptions may be substituted for proof. In this respect the present case is factually similar to the case of *Fiorella* v. *United States,* 468 F.2d 688, petition for a writ of certiorari pending, No. 72-5278.

Thus since all of the policy reasons which prompted the grant of certiorari in *Chavez,* supra, and *Giorando,* supra, are applicable to this case as well, we respectfully request that certiorari be granted here, or in the alternative, that disposition of this petition be held in abeyance until *Chavez* and *Giordano* have been decided on their merits.

2. Petitioners contend here, as they did in the district court and in the circuit court, that the conspiracy merged with the substantive count under the doctrine commonly known as Wharton's Rule. The Rule states:

> "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." *Anderson, 1 Wharton's Criminal Law and Procedure,* Sec. 89, P. 191 (1957).

The courts which have recently had occasion to rule on this issue, in the context of a 1955 prosecution, have taken conflicting views. We urge this Court to resolve the conflict.

The Circuit Court, in this case, citing *U.S.* v. *Becker,* 461 F. 2d 230 (2d Cir. 1972), held that Wharton's Rule was inapplicable. An exception to Wharton's Rule, known as the "third person" exception, is the basis of the *Becker* opinion. This exception limits

Wharton's Rule to those cases where the essential participants are the only conspirators. Accordingly, when "third persons" are added all may be convicted of conspiracy. Thus, in *Becker,* as in the instant case, the court held Wharton's Rule inapplicable because more than five persons were charged with commission of the substantive offense, 18 U.S.C. 1955.

Two District Courts taking an opposing view are Ohio and Florida. See *U.S.* v. *Greenberg,* 334 F. Supp. 1092 (N.D. Ohio 1971) and *U.S.* v. *Figueredo,* 350 F. Supp. 1031 (M.D. Fla. 1972) *Notice of Appeal Filed,* December 9, 1972. (As of this date argument has not yet been scheduled) The Court in *Figueredo* found the reasoning in *Becker* to be erroneous and declined to follow it.

In *Figueredo,* the court analyzed the cases relied upon by *Becker* and concluded that while those cases were examples of the third party exception, *Becker* was not. The exception only applies when the third party cannot be convicted of the substantive offense. An example cited in *Figueredo* is *State* v. *Clemson,* 123 Iowa 524, 99 N. W. 139. There, when a third person conspired with a man and a woman for the commission of adultery by the latter two, all three were properly convicted of conspiracy. However, in the instant case, the "extra defendants" (a total of thirteen defendants were indicted) could be found guilty of the substantive charge, unlike the adultery "matchmaker" in the *Clemson* case.

Becker thus rests upon a mistaken interpretation of the third party exception. *Becker* implies "... that the mere number charged in the indictment takes on a

talismanic quality which obviates the application of the Rule. It is not, however, the mere number charged, but rather the nature of the 'extra' defendants, which determines the result in the individual case." *U. S.* v. *Figueredo, Supra,* at 1035.

Moreover, under *Becker,* Wharton's Rule may be neatly sidestepped by the prosecutorial expediency of charging more than five persons with both the substantive crime and the conspiracy to violate it. *U. S.* v. *Figueredo, Supra,* at 1034.

In the circuit, the Government argued that Wharton's Rule was inapplicable because the "five or more persons" requirement of Section 1955 is merely a jurisdictional requirement and is therefore logically no part of the crime itself. The same argument was advanced by the Government, and rejected, in the *Figueredo* case:

> "But the element of proof in the Government's case would be that five or more persons were involved in the gambling business. Thus, group activity is a necessary element of the offense. The Government admits that this is not a crime for which a 'sole proprietor' of a local bookie operation could be found guilty. This court realizes that the five-person requirement was placed in the statute to bring the activity within federal cognizance. Once put in the statute, however, this 'jurisdictional' element makes the crime one of group activity. A group conspiracy is a logical and necessary prerequisite to commission of the substantive offense by any one of the defendants. To then charge the same group with conspiracy is the result to which Wharton's Rule directs itself." Id. at 1036.

The Government also contended that even if Wharton's Rule was applicable, the only relief to which petitioners were entitled was invocation of the merger doctrine at the time of sentencing. However, where Wharton's Rule is applicable, conspiracy cannot in the first instance be charged and when charged it must be dismissed. *U. S.* v. *Figueredo, Supra.*

The Government's final argument was that Wharton's Rule should be rejected as archaic. However, the rule is viable today because it continues to serve an important function. When conspiracy is an inherent element of the substantive offense, it should not be made an additional crime. To do so would be grossly improper.

The Court, in *U. S.* v. *Figueredo, Supra,* at 1033, reflected upon the importance of Wharton's Rule:

> "Conspiracy is a crime with common law roots and with an unpopular background. See Sayre, *Criminal Conspiracy,* 35 *Harv. L. Rev.* 393. Justice Jackson once commented upon the concept of conspiracy as a separate crime:
>
> > 'The looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case. *Krulewitch* v. *U. S.*, 336 U. S. 440, 449 (1949) (Jackson, J. concurring).'
>
> "The Supreme Court has indicated that it will view with disfavor attempts to broaden the scope of conspiracy prosecutions. *Grunewald* v. *U. S.,* 391 (1957). When seen in this context, Wharton's Rule presents itself as a logical limitation on the use of conspiracy charges by prosecutors."

The question presented is important because of the frequency with which the Government joins counts of conspiracy and 1955 in the same indictment. We, therefore, respectfully urge this Court to resolve the conflict which presently exists in the lower courts, and to ultimately decide that Wharton's Rule requires that petitioners' conspiracy convictions be reversed.

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition because a grant in this case would result in a determination of the sufficiency of proof of proper authorization. This important question does not arise in *Chavez* or *Giordano* and a final determination of that question is of great practical importance.

Because of the conflict in the courts and the frequency of the problem a final determination of the applicability and viability of Wharton's Rule to these cases is also of great practical importance, a writ of certiorari should be granted.

Respectfully submitted,

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